IN THE
SUPREME COURT OF MISSOURI

Thomas G. (Jerry) and Nancy S.THOMPSON, Richard MONTGOMERY, James R. and Barbara M.CAMPBELL, M. Scott and Stacy HAUSMAN (Hausman Trust), William M. McDANIEL, Ralph C. McDANIEL, Stanley (Liston) and Martha KING, and Patricia HOFF,	)
Appellants,	)
v.	) No. SC85225
Clark HUNTER – Morgan County Collector, MORGAN COUNTY R-II SCHOOL DISTRICT, and Jeremiah NIXON ,Attorney General of the State of Missouri,	)
Respondents.	)

Appeal from the Morgan County Circuit Court
Twenty-Sixth Judicial Circuit
Honorable Mary Dickerson

APPELLANTS' REPLY BRIEF

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ARGUMENT

Respondent Morgan County R-II School District and Respondent Amici will be referred to as "District", and Appellant Taxpayers and Appellant Amici will be referred to as "Taxpayers".

All parties agree the constitutional issue at the heart of this appeal should be decided. The District requested transfer so this case could be decided on behalf of itself and over 100 other school districts that would like the constitutional issues resolved at this time. Taxpayers concur.

I. Sections 11 and 22 operate in harmony, with each section imposing its own limitation.

The essence of the District's argument is that the tax rates set under Section 11 are not further limited by law and, in particular, not limited by Section 22.[1] Section 11, however, provides no support for this argument, and, in fact contradicts it. Section 11(c) expressly provides that "the rates herein fixed, and the amounts by which they may be increased may be further limited by law."

The District also asserts that if it is not immune from Section 22, it obtained voter approval in 1998 for a tax increase to $2.75. In support, the District briefs "facts" that are

[1] "[T]he provisions of Section 11(b) … now authorizes [sic] a school board to adopt a $2.75 operating tax levy without any of the constraints of Section 22(a) of the Hancock Amendment." (Resp. Br. 58, emphasis original).

not before this Court.[2] Those "facts" are that the voters of the two counties where parts of the District are located approved Amendment 2 in 1998. That may be so, just as the statewide voters approved Amendment 2 in 1998. Amendment 2, however, was not a vote to raise the District's rate of levy to $2.75. And even if it had bee such a vote, there is not indication whether the District's voters approved it. Under Section 22, it is the voters of the District, and not the counties' voters, who must approve such an increase. Section 22 dictates that the voter approval needed to increase the maximum authorized current levy is "the required majority of the qualified voters of that … political subdivision voting thereon." The District was not the only school district in either county. It is simply not known whether the District's voters voted "yes" or "no" on Amendment 2.

The District further claims that once its tax rate is approved by the voters, Section 22 no longer limits the rate, or the revenue generated thereunder. Again, this argument is entirely without support under the plain words of Section 22. The rollback feature of

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[2] Taxpayers appeal from the *dismissal* of their petition. Now that the District has successfully moved to deny Taxpayers their day in Court, the District seems bent on filling its brief with information outside the record. If all of the information in the District's appendix is in fact required to decide this issue, how can the trial court have properly dismissed this case for failure to state a claim without first determining whether this "information" was true? *See Bosch v. St. Louis Healthcare Network,* 41 S.W.3d 462, 464 (Mo. banc 2001).

Section 22 provides that "If the assessed valuation of property....increases by a larger percentage than the increase in the general price level from the previous year, the maximum authorized current levy … shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized levy on the prior assessed value." Thus, the plain language of Section 22 continues to require a rollback of the rate of levy in any year that excess revenue would be generated by that rate.

To argue that voter-approved maximums are exempt from the prospective rollback flies in the face of Section 22, since the "maximum authorized current levy" will have been set by the voters. Further, the District's reading is entirely inconsistent with the plain purpose of the Hancock Amendment--to prevent tax increases without voter approval. To allow the rate to remain the same while the tax base valuation increases by more than the inflation factor is a not-so-hidden tax increase. To do so without voter approval is a violation of Section 22.

A. Section 22, by its plain and express language, applies.

The law is settled that when a constitutional provision is clear, its express language controls. *City of Hazelwood v. Peterson*, 48 S.W.3d 36, 39 (Mo. banc 2001). Sections 11 and 22 are the provisions of our constitution at issue, and they are clear. The opinions of certain members of the General Assembly or the State Auditor, and the ballot title are not provisions of the constitution. While it is clear that Amendment 2 changed Section 11 of the constitution by relaxing certain of its requirements for increasing certain taxes, it is equally clear that no words in Section 11 indicate any intention of

preempting Section 22. Indeed, Section 11 expressly states just the opposite: "the rates herein fixed … may be further limited by law." Although this point was clearly made in the Taxpayers' opening briefs, the District has failed to directly respond.

Nevertheless, the District contends that with the passage of Amendment 2, Missouri voters repealed or preempted Section 22, at least for school districts and for increases up to $2.75. This alleged repeal was implicit, because there is no language in Section 11 to support that claim. The District would have this Court adopt a Hancock-eviscerating interpretation based on certain dubious and inconclusive "facts," opinions, and documentation of legislative history attached to the District's brief. Those "facts" go beyond the proper record for review of the dismissal of Taxpayers' petition. In any event, those "facts" would not permit the District's case anyway.

The District asserts that there are no "ands", "ifs", "buts", or "maybes" to the constitutional language in Section 11(b)'s alleged grant of tax limitation immunity to school districts (Resp. Br. at 41). This statement is curious given the lengths to which it has gone to: (a) ignore the express language of Section 11; and (b) fill its brief with extraneous "information" outside of the record with the apparent intention of persuading this Court to rewrite Section 11 under the guise of "construction."

The District points to no language in Section 11 that preempts Section 22. There is none. Section 11 fails to even mention Section 22, much less preempt it. Furthermore, the District ignores the express language of Section 11: the "rates herein fixed, and the amounts by which they may be increased may be further limited by law." That "law" is found in Section 22. The District's glaring omission in this regard cannot have been

inadvertent; rather it highlights the District's inability to mount a colorable response to the fatal blow this plain language lands. Implicit repeal is disfavored by the law[3], and repeal of Section 22 is expressly foreclosed here. Plain language controls. Where such plain language exists, there is no need to delve into intent or legislative history. *City of Hazelwood v. Peterson*, 48 S.W.3d 36, 39 (Mo. banc 2001). Section 11 is clear and unambiguous in this regard and should be applied as it is written.

Rather than confronting the language of Section 11 that contradicts the District's position, it mischaracterizes Taxpayers' position in an attempt to create a vulnerable straw man.[4] Contrary to the District's contention (Resp. Br. 52), Taxpayers do not and did not assert, that Section 11 and Section 22 are in conflict with each other. On the contrary, Taxpayers assert that the two sections provide separate, independent limits on the authority of school districts. Section 11 provides an absolute rate limit; Section 22 provides a revenue limit relative to prior years' revenue. School districts must comply

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[3] See *State ex rel. Gordon v. Becker*, 49 S.W.2d 146, 147 (Mo. 1932).

[4] The District ignores Taxpayers' proposition that Amendment 2 and Section 22 are not in conflict, or, if this Court deems otherwise, that the two constitutional provisions can and should be read in harmony, giving meaning and continued applicability to both, and avoiding the implicit repeal of Section 22. Taxpayers' Initial Brief, Point III, subpart A and B, pages 35-47. Yet, at page 52 of its brief the District suggests that "Appellants have alleged that Constitutional Amendment No. 2 is in direct conflict with Article X, Section 22(a) in two situations."

with both limits. Thus, the District's citations of authorities dealing with conflicting provisions are inapposite. Accordingly, Sections 11 and 22 do not conflict. They can and should be harmonized.

For example, the District cites *State ex rel McKittrick v Bode,* 113 S.W.2d 805 (Mo banc 1938), for the proposition that a constitutional provision adopted later in time prevails over an earlier provision. Resp. Br. pp. 53-55. As recognized in *McKittrick*, this principle of construction only applies if two conditions are met: the two provisions cannot be harmonized, and the two provisions cover the same subject matter. Neither condition is met. In harmonizing these provisions to avoid repeal by implication, the Court should recognize that Section 11 provides rate limits and voting requirements up to and beyond the applicable rate limit, and that Section 22 provides a revenue limit and voting requirements to establish a higher revenue limit. These are separate subject matters addressed in different sections of the Constitution.

Likewise, the District misreads *Green v. Lebanon R-III School District*, 13 S.W.3d 278, 284 (Mo. banc 2000) ("*Green I"*). This Court did not "hold that a $2.75 levy may be imposed by a school district after 1998 without voter approval." (Resp. Br. 43, emphasis original). There, the Court was presented with this precise issue, but declined to reach it because the tax years at issue were prior to the adoption of Amendment 2. *Green I,* at 284). Although this Court stated that Section 11(b) addresses the amount of a tax levy that could be imposed without voter approval, it cited a 1967 case, *Three Rivers Junior College Dist. v. Statler*, 421 S.W.2d 235, 238-39 (Mo. banc 1967), for that proposition. Obviously, that authority could have nothing to do with Section 22, which would not be

enacted for another thirteen years. Thus, *Green I* has no relevance to the issue at hand. *Green I* is significant, however, in that it very clearly applied the Section 22 rollback provisions to school districts' "maximum authorized current levies." [*see infra*].

Further, the District alleges that despite the plain language of Section 11, it should be read not as a tax limitation, but should instead be read expansively, in direct contrast to the original 1875 purpose of Art. X, § 11 as articulated in *Hirni v. Missouri Pacific Railroad Co.* 27, S.W. 367 (Mo. 1894). To the contrary, *Brenner v. School District of Kansas City, Missouri* suggests that the 1875 origins of Art. X, § 11 for school districts included the strong intention to limit the schools' authority to tax, as articulated in *Hirni*. 315 F. Supp. 627, 639 (W.D. Mo. 1970). None of the cases cited by District concern the impact of a specific constitutional revenue limit on all local political subdivisions, such as Section 22 imposed in 1980.

Because Sections 11 and 22 apply concurrently to any school district tax increase, the District must comply with both sections.

B. Passage of Amendment 2 did not constitute voter approval of a tax increase to $2.75 in the District.

The District suggests that if Amendment 2 did not forever repeal the Hancock Amendment for schools, then the 1998 vote approving Amendment 2 was a sufficient vote approving a $2.75 rate for Hancock purposes. In making this point, the District alleges that a majority of the voters in Morgan and Moniteau Counties approved Amendment 2.

The District fails to allege that a majority of voters in the Morgan County R-II School District approved Amendment 2. This is the voter approval required by Section 22. The District, as movant in the trial court, would bear the burden to establish that it was in full compliance with the Hancock Amendment. *See Green I*, at 281-82.

Even if the District had asserted as a defense to Taxpayers' petition that the Districts' voters approved a tax increase to $2.75 in 1998, and even if this defense had been proven before the trial court, that fact would excuse only the District's increase to the $2.75 tax rate in 1999. Subsequent property valuation appreciations, such as that which occurred in 2001, would require tax rate rollbacks in that year to comply with Hancock revenue limits. As alleged in Taxpayers' Petition, these rollbacks did not occur. Therefore, the District would still be in violation of the Hancock Amendment. [*see infra*]. However, as a matter of law, the amendment of Section 11 was not an implied approval for a tax increase in the District.

Even if Amendment 2 were a vote to increase the District's rate, there is uttlerly no indication that the voters of the District even approved Amendment 2. Section 22 of the Hancock Amendment requires that the voter approval necessary to raise the maximum authorized current levy be of "the required majority of the qualified voters of that … political subdivision voting thereon." For purposes of the District's argument, that political subdivision would have to be the District. Hancock does not provide for statewide voter approval, or county approval, of a local school district tax increase. The voters of the counties are not the voters of the District. While all of the voters in the

District may be voters in one of the two counties the District mentions, not all of the voters of those counties are voters in the District.

The vote on Amendment 2 was not a vote approving a new, higher tax even for one year. Voters are familiar with such elections approving new, higher taxes and can understand the difference. One example is the local school board-initiated elections submitting a specific new tax increase to a vote in that district. Specific statewide new, higher taxes can be approved as well, such as the vote on Proposition C, mentioned by the District. The vote on Amendment 2 was no such vote. Amendment 2 changed the procedural limitations in Section 11 for raising certain tax rates. Furthermore, Section 11, approved by the voters, was by its own terms "further limited by law," including the limits provided in the Hancock Amendment. Accordingly, the analogy the District attempts to make in citing *Goode v. Bond*, 652 S.W.2d 98 (Mo. banc 1983), a Proposition C case, fails.[5] Amendment 2 did not constitute a tax increase to $2.75 for the District.

[5] The District's citation of *Goode* for the assertion that Amendment 2 effectively removed any Hancock limitations without specifically amending any Hancock provision is erroneous. *Goode* interpreted the state revenue limit of the Hancock Amendment (Art. X, § 18), not the local revenue limit of Section 22. The set of voters approving Proposition C's statewide sales tax were the same set of voters authorized by Hancock to approve statewide taxes. With respect to local taxes, Proposition C mandated that, at the local school district level, schools were to reduce their levy sufficiently to decrease their

C. Section 22's rollback terms apply to the District's tax rates.

Even if the approval of Amendment 2 in 1998 authorized a new "current authorized maximum levy" as used in Section 22, nothing in Section 11 expresses, suggests, or implies any preemption of Section 22's rollback provisions when property valuation increases more from the prior year than does the price index. Such a claim of preemption is not only contrary to Section 11's express terms, but is contrary to subsequent legislative action. Accordingly, the rollback provision in Section 22 would apply to reduce the District's rate of levy after 1999.

In *Green I, supra*, this Court was faced with this issue. The highest rate the voters of the District were alleged to have approved in *Green I* was a rate of $3.15 in 1983, but the District was imposing between $2.75 and $2.55 from 1994-1998. 13 S.W.3d at 280-281. Certain taxpayers sued the District claiming that it set its levy too high for 1994-1998 because it had not rolled back the rate as Section 22 requires. On appeal, this Court determined that the District was required to comply with Section 22's rollback provision, and bore the burden of proving such compliance. This Court so determined even though the District's voters allegedly approved a rate of $3.15 in 1983, and even though the rate then at issue was below that rate. Thus, should this Court deem the state-wide passage of Amendment 2 to constitute a "voter-approved tax increase" for the District, that voter-

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revenues by 50% of the prior year's sales tax revenues, unless local voters approved foregoing all or part of this required levy reduction. *See* 164.013.1 RSMo.

approved rate remains subject to the rate rollback provision when the tax base valuation increases by more than inflation increases. Section 22(a); *Green I*.

Furthermore, the General Assembly has confirmed that Taxpayers' construction is correct. Such confirmation comes from statutes enacted and revised since the passage of Amendment 2, including state foundation aid formula statutes that are cited by the District. Those statutes provide that the $2.75 rate required by state statutes must be reduced when required by the Hancock Amendment. See, e.g., Section 163.021.2 RSMo. ("any district which is required, pursuant to article X, section 22 of the Missouri Constitution, to reduce its operating level below [$2.75] shall not be construed to be in violation"); *accord* Sections 163.015.2, 163.025.1, 137.073.1(3), 178.870 RSMo.

The District's citation of other states' case law also fails to withstand scrutiny. First, this Court is not bound by its sister states' decisions. Furthermore, those decisions are inapposite. *Fahnenstiel v. City of Saginaw*, 368 N.W.2d 893 (Mich. Ct. App. 1985), for instance, might be relevant if the District voluntarily cut its tax levy below its maximum current authorized levy and sought to raise it to a rate still below the maximum. However, nothing suggests that such is the case with the District. Indeed, the allegations of the Taxpayers' petition, *Green I*, and numerous filings by the District all show that the District's current authorized maximum levy is far below the 1983 maximum rate and far below what the District is imposing on taxpayers. If anything, our sister states' case law support the Taxpayers. See, e.g. *Gross Ile Committee for Legal Taxation v. Township of Gross Ile*, 342 N.W.2nd 582, 590 (Mich. Ct. App. 1983) (Michigan Court held that Headlee Amendment—similar to Hancock Amendment—was an "additional

restriction" to separate tax-rate maximums contained in the Michigan Constitution); see also *Zaner v. City of Brighton*, 917 P.2nd 280, 284 (Colo. 1996) (rejecting argument that one constitutional tax limit superceded a prior limit; and instead harmonizing provisions, giving effect to both).

Contrary to what the District strongly implies, Section 22 does not permit school districts to return to a higher maximum tax rate that was in effect in 1980, 1983, or in any other year, without first obtaining voter approval. Section 22 limits school districts to the maximum authorized current levy. If this were not the case, the rollback provision of Section 22 would be a nullity. Taxpayers do not begrudge any district from increasing its rate to any figure up to its "current authorized maximum." But that rate is determined according to the rollback provision of Section 22, unless voters approve a higher rate—a rate that, in turn, will be later subject to the same Section 22 rollback provisions.

The District cites *Green I* for the proposition that a school's maximum authorized current levy is the higher of the rate in effect on November 4, 1980, "or the highest rate approved by the voters since that date". Section 22 does not contain the words "the higher of the rate in effect (at enactment) or the highest rate approved by voters since that date". The language of *Green I* the School relies upon is merely a description of the operation of the last sentence of Section 22(a), which reads as follows:

> "If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage that the increase in the general price level for the previous year, the maximum authorized current levy applied thereto in each county or other political subdivision shall be

reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized levy on the prior assessed value."

Section 22 does not fix the maximum authorized current levy as the higher of the rate in place on 1980 "or the highest rate approved by the voters since that date". For every year after 1980, Section 22(a) requires the maximum authorized current levy to be reduced in any year that valuation growth on the tax base from the previous year exceeds inflation growth.[6]

The genesis of the words "or the highest rate approved by the voters since that date" that the District quotes in mischaracterizing Section 22 is found in 1993 SB 380, Section 163.021.2 RSMo. That statute, which was part of the enactments constituting the Outstanding Schools Act, was designed to revamp the state aid formula, and states:

"Pursuant to section 10(c) of article X of the state constitution, a school district may levy the operating levy for school purposes required by this subsection less any adjustments required pursuant to article X, section 22 of the Missouri Constitution if such rate does not exceed the highest tax rate in effect subsequent to the 1980 tax year."

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[6] *Green I* recognized that the maximum authorized current levy is an annual calculation. At page 283, the decision held that the schools failed to prove "that annual adjustments to the maximum authorized current levy were not required under Article X, section 22(a)..."

It is not clear whether or not the underlined phrase of this statute was intended to describe the maximum authorized current levy of Section 22. If so, it failed to accurately do so. Even had 163.021 been an attempt to describe Section 22, it could not change the wording of Section 22. A statute cannot change or supercede the constitution.

D. The District's maximum authorized current levy is not $3.15.

The District asks this Court to judicially notice that *Green I* held its maximum authorized current levy to be $3.15 since 1983. The District raises an issue of fact, the resolution of which is beyond the purview of a motion to dismiss for failure to state a claim. Furthermore, the burden to prove what is the correct Hancock limit in such a motion is on the District. See *Green I* at 281-282. Not only are these facts contradicted here, the District's request rests upon the same misconstruction of Section 22 discussed above.

The District's 2001 maximum authorized current levy, as pleaded in the Petition upon which this appeal is based, is less than $2.75. Taxpayers' petition alleged that the 2001 tax rate of $2.75 imposed by the District exceeded its maximum authorized levy, in that the increase in valuation from 2000 to 2001 exceeded the rate of inflation growth, and the failure to roll back the rate produced a tax windfall to the District at the expense of taxpayers in violation of the Hancock Amendment.[7]

[7] See Petition paragraphs 11-46, L.F. 007-014. As these allegations are required to be accepted as true, the pleadings do not establish the District's maximum authorized current levy at the $3.15 level.

The Missouri State Auditor's (SAO) Review of 2001 Property Tax Rates, attached to the District's Application for Transfer, which is compiled based in reliance upon representations made by school districts themselves, states that in 2001 the District's maximum authorized current levy was $1.8647. The SAO Review for 2002 (Appendix A1 to Humphreys and Tamko Amicus brief), identified a $1.8162 maximum authorized current levy for the District in 2002.[8]

The District's misconstruction of *Green I* is consistent with its inability to distinguish between a tax rate limit and a tax revenue limit. Section 22(a) is a revenue limit. This revenue limit is accomplished by the annual calculation of a maximum authorized current levy rate. If a school needs more revenue than the revenue limit, it must obtain voter approval to increase its rate of levy. If approved, a new revenue limit is established, and Section 22(a) will thereafter operate on that new limit, and annual recalculations of the maximum authorized current levy rate will continue.

E. Complexity of computation is immaterial .

The District complains that calculating the Hancock rollback rate will be difficult, time-consuming, and complex. Complexity is never grounds for dismissal, nor is it an excuse not to comply with a Constitutional requirement. The District overstates the

[8] To the extent that the District may dispute these prior admissions, resolution of such dispute is a factual inquiry beyond the realm of an appeal from a motion to dismiss for failure to state a claim. Furthermore, the burden to prove what is the correct Hancock limit in such a motion is on the District. See *Green I* at 281-282.

difficulty of the task. These calculations are made every year by school districts on tax rate certification forms submitted to the Missouri State Auditor. The Auditor then confirms and publishes the tax rate maximum established under Section 22.[9]

F. Amendment 2's ballot title.

The District argues that Amendment 2's ballot title advised voters they were authorizing school boards to set levies without a vote of the people. This argument ignores Taxpayers' contention that Section 11 and Section 22 impose separate and distinct limits. The ballot title advised as to only the voting requirements, or absence of voting requirements, as to the applicable Section 11 tax rate limit. It in no way advised voters that amending the Section 11 rate limit would also repeal the Section 22 revenue limit and the voters' right to approve revenue increases above the Section 22 limit.

As a matter of sound public policy, ballot titles should not be resorted to in construing the actual words of the constitution. In *Wenzlaff v Lawton*, 653 S.W. 2d 215 (Mo banc 1983), two cities contended that they were authorized to set tax rates above the Hancock Section 22 limit, and to do so without voter approval. In rejecting their claims, the majority opinion made passing reference to the Hancock Amendment ballot title. In his concurring opinion, pp 217-218, Justice Blackmar provided a reasoned analysis for why ballot titles should not be considered:

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[9] Indeed, in *Green I,* at page 282, note 7, this Court indicated that alleging these Auditor Review numbers alone was sufficient for pleading purposes.

> It is not even appropriate to rely on the ballot title. The title is supplied by the Attorney General for the convenience of the voters ....It is not a part of the initiative petition for which the proponents have sought to collect signatures. The Attorney General's opinion is simply the opinion of a lawyer, and it is not effective to make or declare the law ...Under these circumstances the title supplied by the Attorney General, whether or not modified by the Circuit Court, cannot have the least effect in altering the text of the proposal and, if there is any conflict, the text must prevail. This is so even though the overwhelming majority of the voters probably rely on the title and do not avail themselves of the means available for studying the actual text. Those who rely on the title, on propaganda for or against the initiative, or on media reports must nevertheless be taken to have agreed to the language of the proposal, but nothing else." (citations omitted).

Even were there ambiguity between the plain language of Section 11 and Section 22, which there is not, Missouri courts should apply rules of construction to the actual text adopted, not to the ballot title. A ballot title is merely an attempt to reduce larger volumes of actual text into a shorter summary. A ballot title is placed on the ballot for the sake of polling convenience, as automated voting ballots afford insufficient space for actual text. The summary may or may not be accurate. It is possible the wording of a ballot title can be affected by considerations of political leaning or advocacy. Courts should conclusively presume that the actual text of a constitutional provision is the law. The Constitution of Missouri consists of constitutional provisions, not ballot titles.

In summary, Section 11 does not preempt Section 22. Accordingly, this Court should remand this case to the trial court to determine the District's maximum current levy for the tax years at issue and to take further action not inconsistent therewith.

II. Declaratory Judgment is available and appropriate.

Three alleged deficiencies to the sufficiency of Taxpayer's Declaratory Judgment claims warrant response. The District asserts a lack of justiciability of the claims, the existence of an adequate remedy at law, and untimely filing of the claims.

The District misstates the standard of review. The "substantial evidence" and "weight of the evidence" standards the District cites on page 70 are obviously not at play here because there has been no evidence. The Western District Court of Appeals recognized the correct standard for review.[10]

Contrary to the District's claims[11], the Circuit Court obviously had jurisdiction to render the key declarations of law at issue here: whether because of the operation of

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[10] *Thompson et al. v. Hunter et al.*, WD61742 (Mo. Ct. App., February 18, 2003), App. Br. A10, pp. 7-8.

[11] The District cites *Missouri Soybean Association v. The Clean Water Commission*, 102 S.W.3d 10 (Mo. banc 2003). That case is inapposite. There, the Court was asked to render a declaration respecting the validity of a regulation under Section 536.010. Because the Court determined that the subject of the action was not in fact a regulation, it determined that there was no subject matter jurisdiction.

Section 11, Section 22 no longer applies to increases in school tax levy rates up to $2.75 or no longer applies to roll back levies to below $2.75. That is a declaration of law because, as explained before, Section 11 is plain on its face and should be applied as written, without resort to extrinsic materials. As recognized by the Court of Appeals, the Circuit Court rendered this declaration, albeit erroneously: Section 11(b) "authorized the School District to adopt an operating tax levy of up to $2.75 without voter approval."

The issue before this Court is not whether the circuit court had jurisdiction to render the declaration. The issue is whether, as a matter of law, that declaration was correct. In making that determination, at least when reviewing the dismissal of the petition, this court is to consider only the petition and the law. The petition alleged that the District levied a rate that was higher than the Section 22 maximum and that the Taxpayers paid tax under that rate. They also alleged that they paid the tax under protest and timely filed their action seeking a refund. The law, Sections 11 and 22, are clear that both apply to school tax levy increases. Therefore, this Court should remand to the Circuit Court to determine the maximum levy rate for the District under Section 22 and to enter judgment accordingly. Taxpayers were, as the Court of Appeals found, entitled to a declaration of their rights.

A. Justiciability.

District states that "an actionable violation of the Hancock Amendment must be shown to satisfy the justiciability requirement."[12] District then asks the court to reach a

[12] Resp Br., p. 71.

substantive determination of the very issues for which Declaratory Judgment is sought in order to support its position that Taxpayers lack justiciability. District states: "If we are correct in our Point I that Constitutional Amendment No. 2 approved by the voters in 1998 authorized the School District to adopt an operating levy of $2.75 without further voter approval notwithstanding any provisions of Section 22(a) of Hancock, then there is no Hancock violation, justiciability does not exist and declaratory relief cannot be granted."[13] (emphasis added.)

Taxpayers and the District disagree over the applicability of Section 22. The Taxpayers claim that Section 22 still applies to school district tax levies below $2.75, and still applies to require rollbacks. The District maintains that with Amendment 2, Section 11 preempts Section 22. The parties have a justiciable controversy on that issue of law. This issue is ripe for decision, and was in fact decided, erroneously, by the trial court. Once this Court declares the law on the applicability of Section 22, it will be incumbent on the trial court to determine what the proper Section 22 maximum rate is and to determine if that rate is below the rate the District imposed on the Taxpayers.

B. Adequate Remedy.

The District argues that Taxpayers are entitled to no declaration of their rights or of the law because they already have an adequate remedy in the form of their Section 139.031 count for refund. This is patently wrong.

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[13] *Id*., pp. 71-72.

Even if successful in receiving a judgment under § 139.031 RSMo for refund of the taxes over paid in 2001, the potential for prospective harm is still in place. The judgment would apply only to those taxpayers bringing suit. Such a judgment would result in different rates of taxes paid by different taxpayers, in contradiction to the requirement of Section 3 of Article X that taxes be uniform upon all members of the same class of taxpayers. The School District will have no reason to comply with Hancock if the proper operation of Section 11 and Section 22 is not declared by a court.

The purpose of Section 23 of Article X is to allow taxpayers to seek interpretations or declarations. *Green 1*, supra. Without the correct declaration of the law in this case other school district taxpayers are at risk of overcharges, and the districts themselves would be left with confusion and disarray.[14] Declaratory judgment is the best remedy available to permanently resolve the interpretational issue with respect to Section 22, and to assure that the mandate of Section 3 of Article X is adhered to.

C. Timeliness.

[14] *Nicolai v. City of St. Louis*, 762 S.W.2d 423, 425 (Mo. banc 1988); *King Louie Bowling Corp. of Mo. v. Mo. Ins. Guar. Ass'n*, 735 S.W.2d 35, 38 (Mo. App. W.D. 1987).

District argues that previous case law[15] supports the dismissal of Taxpayers' petition including any request for Declaratory Judgment because the action was not timely filed. District cites these cases in error, because this case is factually distinguishable. In all these cited cases the plaintiffs had failed to institute suit under a proper statutorily prescribed process. In *Koehr I*, Mr. Koehr was allowed to maintain his individual suit on the basis that he had timely filed a § 139.031 refund action.[16] The untimeliness rationale of Judge Wolff's concurrence in *Green I*, to which District refers, is inapplicable in this case as well, because Judge Wolff's language recognized that a timely filed statutory refund action in that case would have preserved the action.[17]

None of the cases the District cites in this regard conclude that a taxpayer is not entitled to a declaratory judgment when that taxpayer is properly before the court contesting the offensive tax. Judge Wolff's concurring opinion in *Green I* states, "Section 23 of article X of the state constitution, a part of the Hancock Amendment, gives taxpayers standing to bring 'actions for interpretation' of the Hancock Amendment[.]" 13 S.W.3d at 287. The Taxpayers, in the context of their timely-filed Section 139.031 claims, have that standing. That fact alone distinguishes them from the

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15 *Koehr v. Emmons*, 55 S.W.3d 859, 863 (Mo.App. E.D. 2001) (*"Koehr I"*); *Green v. Lebanon R-III School District*, 87 S.W.3d 365 (Mo. App. S.D. 2002) (*"Green II"*); *Koehr v. Emmons*, 98 S.W.3d 580 (Mo. App. E.D. 2002) (*"Koehr II")*

16 *Koehr I,* 55 S.W.3d at 864.

17 *Green I,* 13 S.W.3d at 288.

taxpayers in the cases the District cites. The Court of Appeals agreed: "Requiring taxpayers to file a declaratory judgment action by December 31, when we have already determined that the section 139.031 action on which the refund is based can be filed within 90 days after paying taxes under protest, would be absurd."

In the instant case Taxpayers paid their taxes under protest and filed suit within 90 days of payment as proscribed by § 139.031 RSMo. District also ignores the finding of the Court of Appeals in this case that the Taxpayers had filed a timely § 139.031 claim and therefore school was given sufficient notice of the related Declaratory Judgment requests, which necessarily follow the refund claims.

III. Taxpayers alleged compliance with Section 139.031 with sufficient specificity.

In Count IV of their petition, Taxpayers alleged specific facts regarding the District's levy rates during the years 1998-2001, the increase in assessed valuation of property within the District, the rate of inflation growth, that the 2001 tax rate exceeded the maximum authorized levy of Section 22, that they had paid their taxes under protest pursuant to section 139.031, and that the District's 2001 tax rate was in excess of that permitted by law.

The District argues that Taxpayers failed to state a claim, asserting that there is a heightened pleading requirement for a section 139.031 refund claim. The District asserts that Taxpayers were obligated to allege (1) they filed a written statement with the collector, (2) the written statement set forth the grounds for the protest and included the true value in money claimed, (3) the grounds for the petition are the same as those set forth in the statement, and (4) the petition was filed within 90 days after the taxes were

paid under protest. Resp. Br. at 94. Not one of the cases cited by the District to support its argument involves a dismissal of a section 139.031 claim for a pleading deficiency, however.

The District relies in part on cases interpreting the pre-1983 section 139.031, which required taxpayers, in their protest letters, to set forth the grounds on which their protest was based and cite any law, statutes, and facts on which they relied. The District cites *Metal Form Corp. v. Leachman*, 599 S.W.2d 922, 925 (Mo. banc 1980), a case in which this Court precluded taxpayers from asserting claims in their refund suits based on law that had not been cited in their protest letters. The Court stated that the protest must be made based on "then perceived entitlement to relief," not a general claim the taxpayer hopes later to substantiate with authority. The Court did not hold that the taxpayer petition was insufficiently specific, but that the protest letter was deficient. See also *Boyd-Richardson Co. v. Leachman*, 615 S.W.2d 46, 49-50 (Mo. banc 1981). In *Boyd*, the Court specifically determined that the protest letter would not be given the liberal construction that it would give to ordinary pleadings. *Id.* at 50.

Section 139.031 was revised in 1983. Taxpayers are no longer required to cite the law, statutes, and facts on which they rely in their protest letters. Section 139.031(1) now requires that the written statement shall contain grounds on which protest is based and

true value in money claimed by taxpayer. *Stout Indus., Inc. v. Leachman*, 699 S.W.2d 129, 130-31 nn. 1 & 2 (Mo. App. E.D. 1985).[18]

The District also cites *Pac-One, Inc. v. Daly*, 37 S.W.2d 278 (Mo. App. E.D. 2000), to support its contention that Taxpayers' statutory refund claim was insufficiently pleaded. In that case, the court of appeals upheld dismissal for failure to comply with the statutory requirements of filing an appeal with the State Tax Commission, notifying the collector of the appeal by a protest letter, and filing a refund suit within 90 days of filing its protest letter. *Daly* has no application to the case at bar.

The Taxpayers here have fulfilled the terms of section 139.031 and have pleaded their compliance with the statute. To sufficiently plead the performance of a condition precedent, Taxpayers need only generally aver that the condition has been performed. *See* Mo. R. Civ. P. 55.16. *See also Arnold v. Am. Family Mut. Ins. Co.*, 987 S.W.2d 537, 542 (Mo. App. W.D. 1999) (holding that general allegation of compliance with contractual provisions was sufficient to withstand motion to dismiss in spite of fact that

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[18] Other cases District cites are similarly not pertinent here. *State ex rel. Nat'l Investment Corp. v. Leachman*, 613 S.W.2d 634, 635 (Mo. banc 1983), and *Stanton v. Wal-Mart Stores, Inc.*, 25 S.W.3d 538, 540-43 (Mo. App. W.D. 2000), held that the protest letter must be filed at time taxes paid to comply with section 139.031. *Stout Indus.*, 699 S.W.2d at 131-32 held that plaintiffs failed to exhaust required administrative remedies before bringing section 139.031 action.

plaintiff did not specifically set out her contractual obligations or how she complied with such obligations: "Defendants cite us to no authority which requires this degree of specificity in pleading . . . .").

Neither the current version of section 139.031 nor the older, more stringent version required the level of specificity in pleading demanded by the District. The court of appeals correctly found that the allegation that Taxpayers paid their taxes under protest pursuant to Section 139.031 was sufficient to state a claim for a statutory refund. *Thompson v. Hunter*, WD 61742 (Mo. App. W.D. Feb. 18, 2003), App. Br. at A10.

IV. An attorney fee award is available and appropriate.

In its argument on this issue, the District makes no pretense of arguing the law. Rather, it parades the policy argument that the District should not be compelled to pay attorneys' fees to taxpayers who have been overtaxed because that money would be better spent on education. First, there is no school district exception to Section 23. Second, given the posture of this case, even after paying refunds to the few taxpayers who are parties to this case, and paying attorneys' fees to the District's counsel, and paying attorneys' fees to the Taxpayers' counsel, the District may reap a huge windfall anyway. The message unfortunately will not be the message that Section 23 was intended to convey. Rather, the message will be that political subdivisions will benefit from violating the Hancock Amendment.

The District argues that Taxpayers cannot recover attorneys' fees under art. X, Section 23, even if their suit is sustained. That argument is erroneous.

Section 23 grants standing to a taxpayer to "enforce" the Hancock Amendment, including Section 22 thereof, and provides: "if the suit is sustained, [the taxpayer] shall receive … his costs, including reasonable attorneys' fees in maintaining such suit."

Taxpayers herein sued to enforce Section 22 by seeking a declaration that the District is levying more than the maximum tax that Section 22 allows and by seeking the return to Taxpayers of the amount overcharged. The District argues that seeking a declaration that the District violated Section 22 and compelling the District to return an unlawful tax is not "enforcement" of Section 22 because it does not include a claim for injunction to prohibit violation of Section 22 (reduce the rate of the levy before taxes are due and become payable). The District's argument in this regard is disingenuous. It cites no authority to support its argument because the argument is directly refuted by a long line of this Court's cases. Indeed, most of those cases the District has cited in earlier points of its brief, and even quotes the language rejecting its position here (Resp. Br. 76-7, quoting *Koehr*).

In *Ring v. Metropolitan St. Louis Sewer District*, 969 S.W.2d 716, 718-9 (Mo. banc 1998), this Court concluded:

> The enforcement of the right to be free of increases in taxes that the voters do not approve in advance may be accomplished in two ways: First, taxpayers may seek an injunction to enjoin the collection of a tax until its constitutionality is finally determined. Second, if a political subdivision increases a tax in violation of article X, section 22(a), and collects that tax prior to a final, appellate, judicial opinion approving the collection of the increase without voter approval, the constitutional

right may be enforced only by a timely action to seek a refund of the amount of the unconstitutionally-imposed increase. This case falls into the second category. [emphasis added].

This Court followed the above analysis in awarding attorneys' fees in *Hazelwood*, 48 S.W.3d at 41, where the taxpayers successfully maintained a refund action.

V. Conclusion

Taxpayers agree that lawfully-collected school district money is best spent educating Missouri school children. Unfortunately, the District chose to ignore plain language and ignore the Hancock Amendment by adopting its self-serving misinterpretation of Amendment 2. By compelling the District to respect the law, this Court can teach a valuable lesson to those school children.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing Appellants' Brief conforms with Missouri Rule 84.06(b), consisting of 596 lines of text and 7279 words, that the accompanying disk has been scanned for viruses and it is virus-free, and that a true and accurate copy of the foregoing brief and a copy of the accompanying disk which have all been scanned for viruses and are hereby certified as virus-free, was mailed, via U.S. Mail, postage prepaid, this 19th day of August, 2003, to all attorneys of record in this proceeding.

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